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## Heeding human dignity's call: C Dupré, *The Age of Dignity* (Hart 2015)

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Bob Dylan famously searched high and low for it and left us wondering ‘what it’s gonna take’ to find it.<sup>2</sup> These days, the elusive dignity – and her equally, if not more, elusive cousin human dignity – has captured the imagination of not just the poet and philosopher, but also, in light of its increasing prominence in an array of legal contexts, the legal scholar.<sup>3</sup> Catherine Dupré’s *The Age of Dignity* comes at a high point in (human) dignity scholarship, with the publication of numerous texts in the English language emerging on the subject,<sup>4</sup> and with interest in it looking unlikely to dissipate any time soon. In this review, I consider (human) dignity’s promise and pitfalls as it transpires in Dupré’s wide-ranging and ambitious monograph.

### Dupré’s Dignity Narrative

*The Age of Dignity*, subtitled *Human Rights and Constitutionalism in Europe*, embarks on the ambitious task of telling the story of human dignity’s development and transformative significance in European constitutionalism. Dupré proposes to take us on a journey through the archipelago of dignity,<sup>5</sup> and on this cruise we encounter multiple facets and conceptions of dignity with Dupré our thoughtful, thought-provoking and eloquent guide. Yet it is hard to shake the feeling, after reading the book, of having travelled across multifarious islands with Ithaca hardly in sight, to labour the metaphor. Whilst we might enjoy the beautiful journey,<sup>6</sup> it bears consideration whether the dignity ‘compass’<sup>7</sup> developed and lauded by Dupré is guiding us in any direction at all. I return to this issue with some critical reflections on the book after outlining some of its key threads.

The investigation undertaken in this book takes us through multiple constitutional *moments* in which dignity – or human dignity – has been constitutionally enshrined, expounded, or adjudicated upon,<sup>8</sup> with attention paid – *inter alia* – to the French Revolution and the Declaration of the Rights of Man and the Citizen in 1789,<sup>9</sup> the

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<sup>1</sup> Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015); hereafter TAOD.

<sup>2</sup> Bob Dylan, ‘Dignity’ (Columbia Records 1991), cited in Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *EJIL* 655, at 655.

<sup>3</sup> See, for instance, McCrudden, *ibid*; Jeremy Waldron, ‘How Law Protects Dignity’ (2012) 71 *Cambridge Law Journal* 200; David Luban, *Legal Ethics and Human Dignity* (CUP 2007).

<sup>4</sup> See, for instance, Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (CUP 2015); Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (eds), *The Cambridge Handbook of Human Dignity* (CUP 2014); Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013).

<sup>5</sup> TAOD, ch. 1.

<sup>6</sup> See Constanine P Cavafy, ‘Ithaca’ (translated by Daniel Mendelsohn).

<sup>7</sup> TAOD, 140, 165-170.

<sup>8</sup> TAOD, chapters 2-3.

<sup>9</sup> TAOD, 38-52.

establishment of the ILO in 1919,<sup>10</sup> the West German Federal Republic's 'never again' pledge of 1949,<sup>11</sup> and subsequent codifications.<sup>12</sup> Dupré offers manifold insights into the way (human) dignity has emerged as a legal concept across multiple European constitutional layers,<sup>13</sup> and she does so synthesising and building on legal texts, case law and multi-disciplinary academic literature. In this process Dupré offers us fascinating glimpses into a range of non-Anglophone academic commentary on (human) dignity, which are crucial towards unfolding the multilateral academic and institutional conversations<sup>14</sup> taking place on the substance, status and functions of the concept, particularly on the European continent.

Dupré avowedly adopts a narrative 'for' human dignity in the context of European constitutionalism which is 'not purely factual or historical, but is also driven by a spirit of theoretical and critical investigation into human dignity and European constitutionalism'.<sup>15</sup> In Dupré's account, constitutionalism is described as 'a doctrine promoting constitutional means to foster democracy and to prevent abuses of sovereignty, at whichever level it may be exercised'.<sup>16</sup> Dupré highlights the 'rise of dignity', measured through scholarly attention but also increasing legal – notably constitutional – codification and prolific use in both national and supranational case law.<sup>17</sup> She refers to the codification of human dignity in Article 1 of the EU Charter of Fundamental Rights (EUCFR) and Article 2 of the Treaty on European Union (TEU) as the contemporary culmination of (human) dignity's rise, at least in terms of European constitutionalism.<sup>18</sup>

Importantly, however, Dupré raises the paradox of dignity as follows: '2009 can...be seen as a paradoxical stage in dignity's development, whereby its normative status has never been so strong while its semantic status has never been less clear'.<sup>19</sup> Against the sceptics who might portray human dignity as so vague and uncertain as to be useless, Dupré proposes that European constitutionalism offers *definitions* of (human) dignity:

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<sup>10</sup> TAOD, 49-50.

<sup>11</sup> TAOD, 58.

<sup>12</sup> TAOD, chapters 2-3.

<sup>13</sup> It focuses particularly on the EU and ECHR level, as well as certain national jurisdictions – TAOD, chapter 1.

<sup>14</sup> See, on this, McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in McCrudden, *Understanding Human Dignity* (n 4) 54-58. The collection edited by McCrudden is an eminent sample of such conversations. See also Düwell et al, *The Cambridge Handbook of Human Dignity* (n 4).

<sup>15</sup> TAOD, 13, citing Ted Honderich, *The Oxford Companion to Philosophy* (2nd edn, OUP 2005) 638.

<sup>16</sup> TAOD, 7.

<sup>17</sup> TAOD, 1-4.

<sup>18</sup> TAOD, 82.

<sup>19</sup> TAOD, 3.

...a very strong normative definition (human dignity is inviolable), a very precise definition (as a constellation of absolute prohibitions well established in case law since the post-war years), and a very rich definition (as developed in the case law of Member States of the ECHR, and increasingly of the CJEU).<sup>20</sup>

Thus, for Dupré, human dignity's place in the European constitutional order(s) is cemented and affirmed as – or rendered – meaningful by the normative force of inviolability encompassed in Article 1 EUCFR (*pace* Articles 51 and 52 EUCFR); the 'core prohibitions' such as those enshrined in Articles 2-4 ECHR and Chapter I EUCFR,<sup>21</sup> proscribing *inter alia* unlawful killings, the infliction of torture and inhuman and degrading treatment and punishment, slavery and forced labour; and the rich and dynamic definitions offered by courts interpreting and applying human dignity or human dignity-based rights in a vast array of contexts.<sup>22</sup>

The author traces a number of human dignity's beneficiaries and functions. I can only distil them briefly here and cannot claim to do her narrative full justice. In her account, within European constitutionalism, human dignity pertains to 'man'<sup>23</sup> in accordance with 'the threefold definition of humanity as biological being, as citizen and as worker'.<sup>24</sup> This enables her to unpack a thread of human dignity which brings together rights such as those enshrined in Articles 2-4 of the ECHR, Chapter I and Article 31 of the EUCFR, Article 1 of Germany's Grundgesetz, and many other provisions and instantiations of human dignity in legal texts and case law. Human dignity as codified,<sup>25</sup> judge-made,<sup>26</sup> and imagined,<sup>27</sup> protects and empowers humanity, seen in both individual and relational form,<sup>28</sup> in a dynamic and progressive manner. It protects freedom,<sup>29</sup> autonomy,<sup>30</sup> equality,<sup>31</sup> and – it appears – certain labour rights;<sup>32</sup> as well as rights specifically concerning vulnerable persons such as the elderly,<sup>33</sup> including socio-economic rights.<sup>34</sup>

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<sup>20</sup> TAOD, 17.

<sup>21</sup> TAOD, 77.

<sup>22</sup> See TAOD, chapter 4.

<sup>23</sup> Dupré clarifies that this is not a gendered account of the human person: TAOD, 30, at fn 8.

<sup>24</sup> TAOD, 177.

<sup>25</sup> TAOD, chapters 2-3.

<sup>26</sup> TAOD, chapter 4.

<sup>27</sup> TAOD, chapters 6-7.

<sup>28</sup> TAOD, chapters 5-7.

<sup>29</sup> TAOD, 31-33.

<sup>30</sup> TAOD, 33-36

<sup>31</sup> TAOD, 37-38.

<sup>32</sup> TAOD, chapter 5.

<sup>33</sup> TAOD, 154.

<sup>34</sup> TAOD, 137, 139.

Additionally, Dupré builds a novel and elaborate account of human dignity as human time.<sup>35</sup> In this account, human dignity signifies ‘time of one’s own’ (or *Eigenzeit*),<sup>36</sup> a notion not only capturing individual self-determination but also encompassing the recognition of time-/context-specific vulnerability, the protection of the elderly and workers’ time through recognising time’s relativity and its value in non-economic terms and against the forces of ‘total capitalism’,<sup>37</sup> and the safeguarding of a secularly sacred humanity<sup>38</sup> across time.<sup>39</sup> The idea of human dignity as human time also signifies human dignity’s ‘moment’, casting it as the *kairos* of human rights: a time of rupture and discontinuity, whereby a break is made with a tyrannical past and a constitution is built to mark the beginning of a new, democratic time, much like – as she sees it – in 1789, 1949 or 1989.<sup>40</sup> On this account, human dignity is both memory and promise, a stark but also hopeful forget-me-not of past atrocity and tyranny;<sup>41</sup> a rampart against inhumanity, war and dictatorship;<sup>42</sup> and the promise of and tool for constant betterment and for the always unfinished, necessarily vigorous, process of democratisation.<sup>43</sup>

The relationship between human dignity and European constitutionalism in Dupré’s account is symbiotic, attested by her assertion that, while Chapters 2-6 in the book use the framework of European constitutionalism to understand the actual and potential uses of human dignity, Chapter 7 adopts the converse approach of reflecting on human dignity’s theoretical significance for European constitutionalism.<sup>44</sup> Human dignity embodies and takes forward Europe’s post-war commitment to humanity before, or over and above, the sovereign State;<sup>45</sup> and putting humanity centre stage as the identity *and* purpose of European constitutionalism, human dignity pushes European constitutionalism towards a multi-layered<sup>46</sup> and potentially highly

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<sup>35</sup> TAOD, chapter 6.

<sup>36</sup> TAOD, 151-156.

<sup>37</sup> TAOD, 195. See, on the ‘total market’, Alain Supiot, *The Spirit of Philadelphia: Social Justice vs the Total Market* (Saskia Brown tr, Verso 2012).

<sup>38</sup> TAOD, 177.

<sup>39</sup> TAOD, 151-156.

<sup>40</sup> TAOD, 156-160.

<sup>41</sup> TAOD, 58-61.

<sup>42</sup> TAOD, 177.

<sup>43</sup> TAOD, 184-185, citing Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 20-21; and TAOD, 190.

<sup>44</sup> TAOD, 171.

<sup>45</sup> TAOD, 46-47.

<sup>46</sup> On multilevel constitutionalism, see, for instance, Ingolf Pernice, ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review* 511; Mattias Kumm ‘Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice’ (1999) 36 *Common Market Law Review* 351. For a nuanced account on the enduring relevance of ‘sovereignties’ in *Strasbourg* (ECtHR) rather than *Luxembourg* (CJEU), see David Feldman, ‘Sovereignties in Strasbourg’ in Richard Rawlings, Peter Leyland and Alison L Young, *Sovereignty and the Law: Domestic, European, and International Perspectives* (OUP 2013).

judicialised model of humanist constitutional democracy: dignity-democracy.<sup>47</sup> In this model of democracy, the (human) dignity-commitment is ‘interlocked’ in such a way that treaty- and constitution-makers at both national and supranational level are bound to comply with it in any constitutional revisions,<sup>48</sup> a point whose predicate is human dignity’s ‘inviolability-eternity’ as Dupré sees it.<sup>49</sup> On the dignity-democracy paradigm supported by Dupré, European constitutionalism must fend off ‘illiberal developments and systemic breaches of human rights’,<sup>50</sup> perhaps through a militant commitment to its humanist dignitarian foundations.<sup>51</sup> Vigilance is key, and human dignity is there to remind us of humanity’s and democracy’s fragility, and demand their protection.

Thus, as I see it, (human) dignity in Dupré’s narrative is Janus-like:<sup>52</sup> fostering transitions, doorways, new paths, and at the same time eternal, facing both backwards and ahead, possessing and shaping human time. But this is a secular deity,<sup>53</sup> which is in turn possessed and shaped by humans, a *res publica*<sup>54</sup> which can be moulded through ‘inclusive, transparent and democratic discussion, and through the procedural channels and fora of European constitutionalism’,<sup>55</sup> resistant to ossification, ever-shifting. It embraces and safeguards a broadly construed humanity, which includes multiple identities of ‘man’, as well as future generations,<sup>56</sup> a human family which is both empowered and, arguably, duty-bound to shape and protect its existence and its future.<sup>57</sup> Human dignity as *kairos* is both eternal and subversive, and can be used to ward off evil and shape brighter futures, even through radical rifts with a rejected past, much like in some of the historical ‘moments’ identified by Dupré.

Dupré’s account can offer food for thought to the theorist and comparatist of (human) dignity, as well as to the legal scholar. The book’s addition to Anglophone scholarship on human dignity should come to the attention of English public lawyers, who may wish to consider to what extent human dignity is ‘interlocked’ in the UK’s complex

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<sup>47</sup> TAOD, 182-193.

<sup>48</sup> TAOD, 189. On human dignity being ‘interlocked’ across Europe’s jurisdictions, see TAOD, 94-99.

<sup>49</sup> TAOD, 190.

<sup>50</sup> TAOD, 192. Dupré additionally makes some interesting remarks regarding constituent power and constituted power being blurred on the dignity-democracy paradigm, which merit further elaboration, particularly in terms of how they relate to crises (including crises of constitutionalism) – TAOD, 191.

<sup>51</sup> On constitutionalism and ‘militant democracy’, see, for instance, José Antonio-Santos, ‘Constitutionalism, Resistance and Militant Democracy’ (2015) 28(3) *Ratio Juris* 392.

<sup>52</sup> Habermas identifies human dignity as Janus-faced in its moral and legal aspects – see Jürgen Habermas, ‘The Concept of Dignity and the Realistic Utopia of Human Rights’ (2010) 41 *Metaphilosophy* 464, 470. In Dupré’s account, however, I propose that dignity operates as Janus beyond the duality of its moral and legal aspects.

<sup>53</sup> Dupré repeatedly emphasises that her vision of human dignity is of a ‘secular concept’ – see TAOD, 18-21, 170.

<sup>54</sup> TAOD, 21-23.

<sup>55</sup> TAOD, 170.

<sup>56</sup> TAOD, 178.

<sup>57</sup> On the power, and duty, to protect the time of mankind, see TAOD, 152.

and multi-layered constitutional system. This may become especially significant if changes in the UK's human rights protection and/or if a significant rift in the UK's relationship with the EU and/or the Council of Europe come about in the not-too-distant future.<sup>58</sup>

A disclaimer by the author: the project, according to Dupré, is 'envisaged with the normal functioning of democracy and constitutionalism in mind'.<sup>59</sup> This particular proviso raises numerous questions, particularly regarding what 'normal' connotes in relation to the functioning of democracy and constitutionalism given the contested character of both idea(l)s; but it appears to allude to circumstances which do not palpably amount to a 'state of exception' or crisis.<sup>60</sup> This is evident from the author's qualification of this disclaimer, whereby she suggests that she could not ignore the growing number of crises unfolding over the duration of the project, notably the Euro crisis, the adoption of the Hungarian Fundamental Law in 2010 and Iceland's constitutional revision.<sup>61</sup> The selection of those particular crises raises questions as to what has been selected and what has been omitted, and why; but I leave these particular questions to one side. More importantly, perhaps, it is worth contemplating whether this significant disclaimer is compatible with the monumental burden which (human) dignity bears, in Dupré's narrative, in lifting us out of the gutters of indignity and inhumanity and into brighter futures. One wonders whether, in the context of crisis, including the present terrorism threat and the humanitarian plight of millions of asylum-seekers within – or on the fringes of – Europe, European constitutionalism's lauded human dignity might, more or less, justifiably or not, shrug.<sup>62</sup>

### **Conceptual Haziness, Tensions, and the Moral Vacuum: Critical Reflections**

There are certain aspects of this monograph which warrant critical reflection. I wish to briefly focus on three issues: namely, conceptual haziness; tensions and contradictions; and the absence of explicit engagement with human dignity's moral character.

#### *Conceptual Haziness*

Dupré's analysis sometimes tends – in my view – unduly to alternate between dignity and *human dignity*, although she is clearly aware of the significance which could be attributed to the distinction. Whilst dignity can be seen to connote rank or degree of (self-)worth or (self-)respect as exhibited or bestowed, in a way which might

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<sup>58</sup> For an examination of the importance of recognising human dignity as the foundation of human rights in the UK, see Benedict Douglas, 'Undignified Rights: The Importance of a Basis in Dignity for the Possession of Human Rights in the United Kingdom' [2015] *Public Law* 241.

<sup>59</sup> *TAOD*, 15.

<sup>60</sup> Much has been written on the state of exception, particularly in the context of counter-terrorism. See, for instance, Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press 2005).

<sup>61</sup> *TAOD*, 15.

<sup>62</sup> Dupré is aware of this issue – she provides a measured but optimistic response in *TAOD*, chapter 8.

distinguish *among* human beings – so that human persons can be more or less dignified<sup>63</sup> – *human dignity* is generally (though not unanimously) seen to encapsulate an equal moral status or intrinsic worth attributed to all human persons, which is elevated only in the sense of distinguishing *all human persons* from objects or non-human animals.<sup>64</sup> As such, human dignity demands a certain minimum respect and protection from *desecration* – as Dupré puts it – of one’s humanity.<sup>65</sup> Thus, this alternating between dignity and *human dignity* within the book is important not just as a matter of style, but also as a matter of substance. There are points at which Dupré claims that an argument on *human dignity* has been made and references a statement mentioning only dignity, without the epithet human. Perhaps Dupré uses the term dignity (without the epithet human) to connote human dignity as just described. Nonetheless, I wonder whether her assertion of the dignity of citizens and the dignity of workers is always about *human dignity*, and if so whether it takes us down a problematic path whereby all human beings are equal in human dignity,<sup>66</sup> but some are ‘more equal than others’. I return to this point below.

A conceptual haziness also characterises how (human) dignity and its manifestations are described across the book. Without always clarifying or evaluating the significance of any distinction between these notions, (human) dignity is variously ‘appropriated’,<sup>67</sup> ‘breached’,<sup>68</sup> ‘constructed’,<sup>69</sup> ‘crafted’,<sup>70</sup> ‘created’,<sup>71</sup> ‘defined’,<sup>72</sup> ‘deployed’,<sup>73</sup> ‘derived’,<sup>74</sup> ‘designed’,<sup>75</sup> ‘developed’,<sup>76</sup> ‘discovered’,<sup>77</sup> ‘expressed’,<sup>78</sup> ‘infringed’,<sup>79</sup> ‘made’,<sup>80</sup> ‘mapped’,<sup>81</sup> ‘protected’,<sup>82</sup> ‘shaped’,<sup>83</sup> ‘translated’,<sup>84</sup>

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<sup>63</sup> Indeed, Tasioulas suggests that non-human animals may be said to have species-specific dignity: see John Tasioulas, ‘Human Dignity and the Foundations of Human Rights’ in McCrudden, *Understanding Human Dignity* (n 4) at 307.

<sup>64</sup> See Tasioulas, ; see also *TAOD*, at 35.

<sup>65</sup> *TAOD*, 60.

<sup>66</sup> On this premise, see Habermas (n 52); Jeremy Waldron, ‘Citizenship and Dignity’, in McCrudden, *Understanding Human Dignity* (n 4).

<sup>67</sup> *TAOD*, 86.

<sup>68</sup> *TAOD*, 103.

<sup>69</sup> *TAOD*, 21.

<sup>70</sup> *TAOD*, 86.

<sup>71</sup> *TAOD*, 88.

<sup>72</sup> *TAOD*, 132.

<sup>73</sup> *TAOD*, 99.

<sup>74</sup> *TAOD*, 87.

<sup>75</sup> *TAOD*, 22.

<sup>76</sup> *TAOD*, 86.

<sup>77</sup> *TAOD*, 87.

<sup>78</sup> *TAOD*, 18.

<sup>79</sup> *TAOD*, 111.

<sup>80</sup> *TAOD*, ch 4.

<sup>81</sup> *TAOD*, 13.

<sup>82</sup> *TAOD*, 21.

<sup>83</sup> *TAOD*, 103.

<sup>84</sup> *TAOD*, 94.



‘understood’,<sup>85</sup> and ‘used’.<sup>86</sup> It is variously described – *inter alia* – as a ‘concept’,<sup>87</sup> ‘good’,<sup>88</sup> ‘idea’,<sup>89</sup> ‘principle’,<sup>90</sup> ‘right’,<sup>91</sup> ‘tool’,<sup>92</sup> and – as mentioned – *compass*.<sup>93</sup> I note this because it raises numerous questions, such as whether (human) dignity is something whose content is discovered or constructed, or whether its varied manifestations and functions can sensibly co-exist; and because, particularly insofar as human dignity is seen as a *legal* concept, these things matter.<sup>94</sup>

Moreover, Dupré’s frequent reference to semantic status or meaning<sup>95</sup> or *definitions*<sup>96</sup> elides the nuance necessary to appreciate that a concept’s specification<sup>97</sup> involves its application in a (potentially infinite) array of circumstances, which can both bring our abstract understanding of it into sharper focus and reveal some of its heretofore unexplored or under-explored dimensions.<sup>98</sup> Indeed, this is the way that her account of human dignity as pertaining to identified beneficiaries such as workers in particular circumstances and with particular implications can perhaps best be understood. At the same time, the definitions she offers in response to sceptics skate mostly on the surface of some of the controversies and tensions identified in specifying what human dignity demands in particular contexts – I return to this below.

### *Tensions*

Relatedly to the conceptual haziness identified, Dupré often glosses over tensions in her dignity story. For instance, the marital rape case in the ECtHR may have involved vindicating the sexual autonomy of married women;<sup>99</sup> but how did this square with the strict non-retroactivity principle encapsulated in Article 7 ECHR and its implications for the rule of law and human autonomy in the Europe of human

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<sup>85</sup> TAOD, 21.

<sup>86</sup> TAOD, 22.

<sup>87</sup> This is the case throughout TAOD.

<sup>88</sup> TAOD, 21.

<sup>89</sup> TAOD, 18.

<sup>90</sup> TAOD, 17.

<sup>91</sup> TAOD, 166.

<sup>92</sup> TAOD, 16.

<sup>93</sup> TAOD, 140, 165-170.

<sup>94</sup> On this, see McCrudden, ‘Introduction to Current Debates’ (n 14).

<sup>95</sup> TAOD, 3.

<sup>96</sup> See, for instance, TAOD, 17, and Chapter 6.

<sup>97</sup> Habermas, for example, considers human rights to be legal specifications of human dignity – see Habermas (n 52) 464. In turn, on the specification of rights, see, for instance, Russ Shafer-Landau, ‘Specifying Absolute Rights’ (1995) 37 *Arizona Law Review* 209; John Oberdiek, ‘Specifying Rights out of Necessity’ (2008) 28 *OJLS* 127.

<sup>98</sup> This is only mentioned in passing and by reference to German academic commentary on Article 1 of the Grundgesetz at TAOD, 160. See, also, David Hollenbach, ‘Human Dignity: Experience and History, Practical Reason and Faith’ in McCrudden, *Understanding Human Dignity* (n 4).

<sup>99</sup> See *SW v UK*; *CR v UK* (1996) 21 EHRR 363.

dignity?<sup>100</sup> Moreover, what is the ultimate connection between safeguarding the human dignity of unpopular, marginalised, and/or disenfranchised human persons and democracy, and which mechanism of protection ought to prevail in Dupré's 'dignity-democracy'?<sup>101</sup> Dupré's suggestion that safeguarding human dignity will occur through 'inclusive, transparent and democratic discussion, and through the procedural channels and fora of European constitutionalism, with...courts playing a key role'<sup>102</sup> elides rather than resolves the institutional tensions which perennially plague these matters. Additionally, what is the relationship between safeguarding an abstract and inter-generational humanity and supporting self-determination, and can a freedom-/autonomy-focused human dignity capture it? Some of these issues or the tensions underpinning them have been repeatedly highlighted by dignity scholars,<sup>103</sup> and Dupré does not clearly respond to them.

Another issue is that, whilst a promising and illuminating argument is made in relation to the Declaration of the Rights of Man being imbued with 'the spirit of dignity as equality' even whilst it uses the term '*dignités*' to refer to official rank,<sup>104</sup> the author does not build on this insight by exploring instantiations of human dignity in contexts in which express reference to (human) dignity may have been absent. If 'the word [comes] after the substance',<sup>105</sup> and if human dignity's significance within European constitutionalism lies in the substantive value(s) it embodies and protects, and not merely in offering a unifying language, then in telling the story of human dignity we should also be trying to find instances of its vindication even without its explicit mention.<sup>106</sup> Otherwise, the story is skewed to reflect the linguistic use, rather than the substance, of human dignity in legal texts and judgments. Whilst Dupré claims to have captured the most momentous struggles in the rise of human dignity,<sup>107</sup> the story of the recognition of women's humanity is palpably missing, for example.

The substance versus rhetoric issue is broader. There is tension within the book between two perspectives on human dignity. On the one hand, human dignity embodies something substantive and meaningful, rich in content, as Dupré suggests;<sup>108</sup> on the other, it often seems to amount simply to the way we (may wish

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<sup>100</sup> For Dupré, autonomy is a key aspect of human dignity: *TAOD*, 33-36; and the rule of law is a key aspect of constitutionalism: *TAOD*, 141.

<sup>101</sup> *TAOD*, 182-193.

<sup>102</sup> *TAOD*, 170.

<sup>103</sup> See, for instance, McCrudden (2008) (n 2) and (2013) (n 14). On autonomy and paternalism, for instance, see McCrudden (2008) at 705-706.

<sup>104</sup> *TAOD*, 40.

<sup>105</sup> *TAOD*, 43. Dupré also broadly attributes human dignity concerns to the ECHR, although there was no explicit mention of human dignity in it; she does so also in light of Strasbourg case law alluding to human dignity: see *TAOD*, 63-66.

<sup>106</sup> Matthias Mahlmann, 'The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law' in McCrudden, *Understanding Human Dignity* (n 4) at 595, citing Noam Chomsky, *New Horizons in the Study of Language and Mind* (CUP 2000) 147.

<sup>107</sup> *TAOD*, 51.

<sup>108</sup> *TAOD*, 17.

to) dress up or express our intentions as Europeans to be better and do better following spectacular moral failures, without agreeing on – or even properly contemplating, at least not *en masse* – why and how.<sup>109</sup> If human dignity is more than just the latter – that is, more than a linguistic blank canvas on which people and institutions (might) project ‘best intentions’ from an array of political ideologies and visions of the good, following what is widely perceived to have been a spatially and temporally contextualised morally disastrous era – then a project which seeks to tell its story should be focusing more closely on conceptualising its substance and finding its proper instantiations.<sup>110</sup> Although Dupré comes close to doing this in drawing connections between the Kantian theory of human dignity and the 1789 Declaration, Article 18 of the 1793 Declaration, and the ILO principles,<sup>111</sup> she does not pursue it more holistically.

### *The Moral Vacuum*

In my view, the tensions and contradictions outlined above are, to a large extent, symptomatic of a key aspect of Dupré’s study: the aversion to morality, which emerges in her assertion that ‘human dignity has nothing to do with morality, it is about human existence’, with reference to Kateb<sup>112</sup> – but, in my view, without engaging with some of the nuances in Kateb’s thesis.<sup>113</sup> Is human dignity, in Dupré’s account, a descriptor of a state of being, so that, indeed, many if not most of us are not *born* in dignity;<sup>114</sup> a matter of semantic debate – to be resolved, perhaps, through a focus on popular usage; a matter of political contestation, representing victorious ideologies we can associate with it in different historical contexts; a positivist legal concept identifiable through pedigree-based legal method and ultimately traced down to social fact;<sup>115</sup> a tool for the (legal) wordsmith, through which said wordsmith – perhaps a lawyer before the ECtHR – can promote his or her preferences?<sup>116</sup> Or is it a moral concept, or morally imbued legal concept – perhaps an interpretive concept<sup>117</sup> – whose substance we are trying to capture?<sup>118</sup>

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<sup>109</sup> See Christopher McCrudden, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’ in McCrudden, *Understanding Human Dignity* (n 4) at 2 (citations omitted): ‘The familiar story is that when the Universal Declaration of Human Rights was being drafted in 1948, the participants were able to agree on what they were against, but not on *why* they were against these violations.’

<sup>110</sup> See Mahlmann (n 106) at 594-595. On conceptual interpretation, see Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011), chapter 8.

<sup>111</sup> See *TAOD*, 47-50.

<sup>112</sup> *TAOD*, 21, citing George Kateb, *Human Dignity* (Belknap Press of Harvard University Press, 2011) 10-17.

<sup>113</sup> See, for instance, Kateb, *ibid*, at 13, 23. For more on Kateb, *Human Dignity*, *ibid*, see Bryan Pilkington, ‘George Kateb, *Human Dignity* Book Review’ 66(2) *The Review of Metaphysics* 369.

<sup>114</sup> *TAOD*, Chapter 2.

<sup>115</sup> See, for instance, Jules Coleman, ‘Rules and Social Facts’ (1991) 14(3) *Harvard Journal of Law & Public Policy* 703.

<sup>116</sup> See the critical take on this in Martti Koskeniemi, *From Apology to Utopia* (CUP 2005).

<sup>117</sup> On interpretive concepts, see Ronald Dworkin, *Justice for Hedgehogs* (n 110) 123, chapter 8.

<sup>118</sup> The idea of a heuristic concept which Dupré puts forward (see *TAOD*, 16-18) can accommodate this possibility.

That Dupré does not seem to take a clear evaluative stance beyond the selective narrative adopted entails that, while her perspective on the way human dignity's content and significance has been shaped over time remains eminently positive and optimistic, she leaves underlying tensions largely unaddressed. This is tied to an issue hinted at above: Dupré's identification and embrace of what is in effect a plurality – or archipelago<sup>119</sup> – of meanings and functions of (human) dignity raises the question of whether she has appropriately responded to McCrudden's critique of human dignity as being 'a relatively empty shell' which can countenance an array of competing and conflicting conceptions.<sup>120</sup>

But there is a more problematic dimension to the dismissal of morality when talking about human dignity. A wishful perspective on human dignity's malleability may present it as offering a tool for good – for progress, for democratic engagement with how to be/do better – and a platform for fruitful constitutional dialogues which reach all the way from Europe's supranational institutions to Europe's diverse *demos* and back again to shape ever-brighter futures. This, of course, leaves question marks as to the place in this enterprise of Europe's human outsiders, whose deaths at the geographical and figurative fringes of Europe we are witnessing daily; and as to how to resolve relevant institutional tensions, which pose considerable and urgent challenges. Moreover, a bleaker outlook on human dignity's malleability would warn us of the likely hegemonic capture of this concept through power-politics.<sup>121</sup> This is no mere spectre; one can easily imagine the appropriation of workers' 'human' dignity as put forward by Dupré to render fundamental socio-economic rights dependent on readiness to work on the terms of an increasingly brutal and brutalising neoliberal market.<sup>122</sup> Ultimately, one could well argue that the hopeful but also self-congratulatory tinge of the 'never again'<sup>123</sup> narrative and positive characterisation of Europe's dignity developments would comfortably fit a critical account of alternating between apology and utopia.<sup>124</sup>

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<sup>119</sup> TAOD, 8.

<sup>120</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation' (n 2) at 698.

<sup>121</sup> See Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge 2007) 8, 196. But see Tina Beattie, 'The Vanishing Absolute and the Deconsecrated God: A Theological Reflection on Revelation, Law and Human Dignity' in McCrudden, *Understanding Human Dignity* (n 4).

<sup>122</sup> Indeed, Shklar's idea of the 'dignity of work' can be seen as potentially compatible with such development – see Judith Shklar, *American Citizenship – The Quest for Inclusion* (Harvard University Press 1995) 1, as cited in Virginia Mantouvalou, 'Workers Without Rights as Citizens at the Margins' (2013) 16 *Critical Review of International Social and Political Philosophy* 366, 375, in turn cited at TAOD, 136. In light of Dupré's account of human dignity's support for the elderly (see, for instance, TAOD, 154), it is worth citing a European study on welfare, ageism and neoliberalism: Monika Wilińska and Elisabet Cedersund, "'Classic ageism" or "brutal economy"? Old age and older people in the Polish media' (2010) 24 *Journal of Aging Studies* 335.

<sup>123</sup> See TAOD, 58-61, 121-122, 141-142.

<sup>124</sup> See Martti Koskeniemi, *From Apology To Utopia* (2nd edn, CUP 2006). Notably, however, Dupré denounces complacency: see TAOD, 198.

What, if any, is Dupré's stance on the concrete prospect of a bleaker future? To take an example from the book, Dupré's account of a pragmatic backtracking in ECtHR doctrine – based, presumably, on a self-preservation instinct vis-à-vis the UK's vocal discontent – in *Hutchinson v UK*<sup>125</sup> so as to dilute the human dignity-based demand for a clear prospect of release for whole life prisoners on the basis of Article 3 ECHR, is devoid of a prescriptive position.<sup>126</sup> This is so despite her frequent praise for the progressive living instrument doctrine of the ECtHR,<sup>127</sup> which underpinned the establishment of a 'right to hope' for whole life prisoners in *Vinter v UK*.<sup>128</sup> This raises the question: is Dupré's narrative a rosy account of the development of European constitutionalism,<sup>129</sup> but ultimately *amoral*? There are certainly elements in Dupré's human dignity narrative of evaluative judgement – in particular, of considering certain conceptions of human dignity to be *better* than others. Indeed, her support for evolutive interpretation (versus originalism)<sup>130</sup> both embodies an evaluative stance and presupposes that there are morally sound and morally unsound accounts of human dignity and of the substantive scope of human rights.<sup>131</sup> Otherwise, if, say, Dupré is only supporting interpretive shifts which merely diagnose and reflect popular societal changes,<sup>132</sup> she must be prepared to have her high hopes of European society and 'civilisation'<sup>133</sup> crushed, and to countenance significant regressive developments in interpreting the demands of human dignity, for instance in how asylum-seekers or prisoners ought to be treated. If Dupré is not prepared to countenance this as part of her human dignity-constitutionalism story,<sup>134</sup> her evaluative stance should be more transparent. For this – the *ought* element in her story – Dupré must embrace the moral dimension of her (human) dignity narrative, which she appears to renounce at the beginning of the monograph,<sup>135</sup> but which strikes me as deeply embedded in her past-denouncing, future-embracing conception of human dignity as *kairos*. After all, if human dignity is meant to be the compass that guides us

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<sup>125</sup> *Hutchinson v UK* (2015) 61 E.H.R.R. 13. The case has been referred to the ECtHR's Grand Chamber.

<sup>126</sup> *TAOD*, 164-165.

<sup>127</sup> See, for instance, *TAOD*, 184.

<sup>128</sup> *Vinter and others v UK* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013). See the comment in Natasa Mavronicola, 'Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution' (2014) 77(2) *MLR* 292.

<sup>129</sup> Pace the exploits of the EU's FRONTEX agency, for example, outlined in Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding Technical Relationships' (2012) 28 *Utrecht Journal for International and European Law* 20.

<sup>130</sup> *TAOD*, chapter 7.

<sup>131</sup> See, on this, George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *EJIL* 509, 531.

<sup>132</sup> See *TAOD*, 188.

<sup>133</sup> The – perhaps disquieting – allusions to civility and civilisation in *TAOD* are multiple: see *TAOD*, 78, 100, 125, 175, 196.

<sup>134</sup> Her aversion to a morally worse future is evident at many points in the book: see, for instance, *TAOD*, 148-150.

<sup>135</sup> *TAOD*, 21, citing George Kateb, *Human Dignity* (Belknap Press of Harvard University Press, 2011) 10-17. See John Tasioulas on deploying 'moral reasoning' in 'Human Dignity and the Foundations of Human Rights' in McCrudden, *Understanding Human Dignity* (n 4).

through what to hold onto (its eternal aspect) and what to break away from (its subversive aspect) then it surely has much to do with morality.<sup>136</sup>

Lastly, I return to another issue hinted at earlier: questions may be raised about the *human* in the European human dignity – or dignities – which Dupré expounds. From a legal perspective, we may be prepared to accept that the contingent aspects of legal norms and institutions – including the very institution of the State, or the EU, as well as State sovereignty and jurisdiction – entail that not every human being on Earth can at any moment in time claim the benefits of Europe’s legal protection of human dignity. The moral defensibility of this reality is too vast a matter to discuss or problematize here – or to expect Dupré to tackle in this monograph. What particularly troubles me in Dupré’s account of human dignity, however, is that the substance given to it – rather than the structural barriers to enjoying this substance – may allow or even enable the reproduction of mechanisms of othering<sup>137</sup> which attack the very core of human dignity: that is, the equally elevated moral status, or intrinsic worth, of *all human persons* above objects or non-human animals.<sup>138</sup> For instance, whilst admittedly workers or citizens warrant human dignity’s protection *qua* human,<sup>139</sup> Dupré is also suggesting that human persons attract particular *human* dignity protections *qua* workers and *qua* (EU) citizens.<sup>140</sup> But while all citizens and workers might be human (as are all jobless, homeless, stateless, disabled, non-gender-conforming persons and countless other specifications or ‘categories’ of human persons), not all humans are workers or (EU) citizens. This raises the question of whether, within Dupré’s account of human dignity and European constitutionalism, some persons’ status as workers or EU citizens elevates or ought to elevate their human dignity and concomitant human rights above others’. Concretely, to give one example of the implications of this within Dupré’s narrative, suggesting that reading Article 4 EUCFR in conjunction with Article 3 ECHR can be a premise for a requirement of ‘decent remuneration’, which protects workers from destitution, raises the question: would other human persons *not* be entitled to such protection from destitution on the basis of human dignity? Could some be seen to be deservedly destitute?<sup>141</sup> Additionally and more broadly, to return to a theme repeated across this review, if human dignity is viewed and constructed as a *res publica*<sup>142</sup> through ‘democratic discussions’ premised on a constitutionalism which is humanist in *both* process and substance, who forms the

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<sup>136</sup> I contrast this with Dupré’s suggestion that human dignity has nothing to do with morality. See text to n 112 above.

<sup>137</sup> Consider, for instance, Weiler’s prophetic ‘Us and Them’ warning prior to the establishment of EU citizenship, in Joseph Weiler, ‘The Transformation of Europe’ (1991) 100(8) *Yale Law Journal* 2403, 2482.

<sup>138</sup> See, for instance, Mahlmann (n 106) 598; Tasioulas (n ??) at 305.

<sup>139</sup> *TAOD*, 126.

<sup>140</sup> For a nuanced account of the relationship between human dignity and the dignity of citizenship, see Jeremy Waldron, ‘Citizenship and Dignity’, in McCrudden, *Understanding Human Dignity* (n 4).

<sup>141</sup> See the critical comment on such a stance in Colm O’Cinneide, ‘A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights’ (2008) 5 *EHRLR* 583, 588.

<sup>142</sup> *TAOD*, 21-23.

*demos* who can possess and mould human dignity, who is and who ought to be excluded from it, and why?<sup>143</sup>

Perhaps some of these concerns stem from Dupré's narrative seeking to make *human* dignity do too much, or allowing it – within her narrative – acceptably to *do* and *be* such a variety of things that pervasive tensions and a lack of coherence become inevitable.<sup>144</sup> Or perhaps a more morally coherent story is possible – and necessary.<sup>145</sup>

## Conclusion

*The Age of Dignity* offers an array of ways of thinking about, interpreting, and shaping (human) dignity through time, illuminated with not only insight but also compassion, and with the aspiration of a humanist constitutionalism at its centre. Whether and insofar as we are fascinated, inspired, or troubled by the (human) dignity story or stories being told, I take Dupré's book as calling on us to 'heed the call'<sup>146</sup> of human dignity, and to enter the conversation, to engage in the ongoing endeavour of determining the substantive contours of the minimum respect our common humanity requires. Of course our all too human<sup>147</sup> grasp of how best to navigate this morally contested terrain is likely to be flawed; we must try our best nonetheless.<sup>148</sup> Aiming to do and be better demands it.

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<sup>143</sup> Dupré recognises that certain human rights, notably the absolute rights found in the ECHR and EUCFR, protect 'foreigners' and other 'voiceless minorities' – see *TAOD*, 186; see also, on asylum-seekers' protection, *TAOD*, 110-111. Yet foreigners do not enjoy the full range of civil and political or socio-economic rights and benefits associated with EU citizenship. On human rights and the 'other', see William P Simmons, *Human Rights Law and the Marginalized Other* (CUP 2014).

<sup>144</sup> See McCrudden (2008) (n 2) at 723.

<sup>145</sup> Such a story could broadly follow Dworkin's pursuit of integrity – see Dworkin, *Justice for Hedgehogs* (n 110), especially Chapters 1, 4, 6-9.

<sup>146</sup> Although a commonly used phrase, the plea to 'heed the call' is also a reference to Bob Dylan's 'The Times They Are A-Changin'' (Columbia Records 1964), in which 'the times' could be read as embodying the idea of *kairos* outlined by Dupré – see *TAOD*, 157-160.

<sup>147</sup> See Friedrich Nietzsche, *Human, All Too Human* (R J Hollingdale tr, CUP 1986).

<sup>148</sup> See Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25(2) *Philosophy & Public Affairs* 87, 122, 139.